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Opinion following transfer from Supreme Court

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. LEO LLOYD ADAMS, Defendant and Appellant.	B252187 (Los Angeles County Super. Ct. Nos. TA103351, BA372321)

APPEAL from a judgment of the Superior Court of Los Angeles County, Larry P. Fidler, Judge. Affirmed.

Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Idan Ivri and Steven E. Mercer, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted appellant Leo Lloyd Adams of two counts of first degree murder and three counts of attempted murder as an aider and abettor, with gang and firearm enhancements. In an opinion filed in June 2015, we affirmed the judgment. Thereafter, the California Supreme Court decided *People v. Chiu* (2014) 59 Cal.4th 155, 167, which held that a defendant may not be convicted of first degree murder on a theory of natural and probable consequences. In July 2015, we modified our initial opinion in light of *Chiu,* finding that any error caused by instructing the jury on the natural and probable consequences doctrine was harmless beyond a reasonable doubt.

The California Supreme Court granted review, and later remanded the case to this court with directions to vacate our previous decision, and to reconsider the case in light of *In re Martinez* (2017) 3 Cal.5th 1216 (*Martinez*). That case held that, where the jury is given an instruction on the natural and probable consequences doctrine, a defendant's first degree murder conviction requires reversal unless the reviewing court concludes beyond a reasonable doubt that the jury actually relied on a legally valid theory. After consideration of *Martinez*, in April 2018 we issued an opinion again affirming the judgment, finding beyond a reasonable doubt that the jury actually relied on the theory that appellant aided and abetted the murders and attempted murders with intent to kill.

Appellant again petitioned for review in the California Supreme Court. The Supreme Court granted review and later remanded the case with directions to vacate our April 2018 decision and reconsider the

cause in light of Senate Bill No. 1437 (S.B. 1437) (Stats. 2018, ch. 1015). We now vacate our April 2018 opinion, and issue this opinion considering appellant's original contentions, and the additional issue concerning the effect of S.B 1437. We affirm the judgement without prejudice to appellant filing a petition for relief under S.B. 1437 in the trial court.

FACTUAL AND PROCEDURAL SUMMARY

In 2008, the Grape Street Crips gang was at war with the East Coast Crips gang. On September 23, 2008, Debruce Smith, a member of the 89 East Coast Crips, was at the Compton train station with his girlfriend, Jacqueline Spinks, and his best friend, Terry Dozier. Two individuals drove up to Smith and told him that there was a "grapester" behind them and that one of them "got into it with him, but he ain't nothing."

Richard Roberson was a member of the Grape Street Crips. As he walked past Smith, Smith recognized him as the "grapester" in question. Smith caught up with Roberson and the two appeared to argue. Roberson then walked past Spinks, talking on his cell phone. She overheard him mention the name Beezy or Breezy and say, "I got into it with a coaster." When Spinks asked Smith what had happened, he, too, answered, "I got into it with him." Spinks asked Smith to leave, but he refused, stating, "He wanted to call his people, I'm going to call mine." He nevertheless agreed to "walk away," and they started walking back.

When Smith's cousin, Tinnar Wilson, joined them, Smith was pacing on the platform. Roberson was standing nearby with two other individuals and was talking on his cell phone. Smith identified Roberson as a member of an enemy gang and told Wilson, "This young cat right here is trippin." As Smith headed off the platform, Roberson ran after him and made derogatory statements about Smith and his gang. Wilson offered to "fade," or fistfight, Roberson. Roberson responded, "When my homies get here, there ain't going to be no fading." Smith was on parole and did not want to fight, but he again refused to leave the area.

At some point, a black Tahoe pulled up to the station, and three women and appellant's codefendant Ronald Brim got out. Minutes later, appellant, a member of the 118th Street Watts Crips Gang whose nickname was "Beezy," arrived in a champagne-colored car. Roberson was overheard saying, "It's going down," and telling Brim, "There goes those niggas there." Brim reached in through the front passenger window of appellant's car and pulled out an automatic rifle. He said, "You bitch ass ain't going to do nothing," cocked the rifle, and fired at least 12 shots. Smith and Dozier were shot as they were running away and died at the scene. Three bystanders at the crowded station were wounded.

The black Tahoe and a gold-colored car were captured by surveillance video at the train station. Brim was arrested for drunk driving, and an officer identified his Tahoe as the one involved in the shooting. Spinks and another bystander identified Roberson in a six-

pack photographic lineup. Appellant was arrested in 2010. He owned a gold Pontiac similar to the champagne-colored car involved in the shooting. Cell phone records indicated that phones registered to Brim and appellant were used near the train station at the time of the shooting and travelled away from the area afterwards. A call from a phone registered to Brim was placed to appellant's phone immediately before the shooting.[1]

Appellant, Roberson, and Brim were charged in a consolidated information with two counts of first degree murder (Pen. Code,[2] § 187, subd. (a)) and three counts of willful, deliberate and premeditated attempted murder (*Id.*, §§ 664/187, subd. (a)), with gang, multiple murder, and firearm enhancement allegations (*Id.*, §§ 186.22, subd. (b)(1)(C), 190.2, subd. (a)(3), 12022.53, subd. (d)).[3]

The jury convicted appellant as charged, found the murders to be in the first degree, the attempted murders to be willful, deliberate, and premeditated, and the special allegations to be true. The trial court denied appellant's motion for a new trial and sentenced him to two life

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[1] Appellant's defense at trial was that on September 23, 2008, he had been at work between 7:00 a.m. and 7:00 p.m. and could not have been at the Compton train station at about 6:30 p.m. when the shooting occurred.

[2] Unspecified statutory references will be to the Penal Code.

[3] In a separate count, Brim was charged with possession of a firearm by a felon. He and appellant were tried before the same jury. Brim received the death penalty. Roberson, who was a minor at the time of the shooting, was tried separately.

sentences without the possibility of parole, three life sentences with the possibility of parole, and an additional 125 years. This appeal followed.

DISCUSSION

I. *Instruction on Voluntary Manslaughter*

Appellant argues that the court erred in not instructing the jury, sua sponte, on voluntary manslaughter based on imperfect defense of another. His theory is that he rushed to the scene to aid Roberson, who had called for help.

Even in the absence of a request, the trial court must instruct on lesser included offenses whenever there is substantial evidence that the lesser, but not the greater, offense was committed. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) Voluntary manslaughter based on imperfect self-defense or defense of another is a lesser offense included in the crime of murder. (*People v. Randle* (2005) 35 Cal.4th 987, 997, overruled on a different ground in *People v. Chun* (2009) 45 Cal.4th 1172, 1201; *People v. Barton* (1995) 12 Cal.4th 186, 201.) We independently review whether the trial court erroneously failed to instruct on a lesser included offense. (*People v. Avila* (2009) 46 Cal.4th 680, 705.)

Initially, we disagree with respondent's suggestion that an aider and abettor is not entitled to rely on imperfect self-defense or defense of another. As respondent recognizes, in the aider and abettor context, the mens rea of each participant in a crime ""float[s] free"" and is independent of that of any other participant. (*People v. McCoy* (2001)

25 Cal.4th 1111, 1119.) Thus, an aider and abettor may be guilty of a greater or lesser homicide-related offense than the perpetrator. (*Id.* at p. 1122; *People v. Nero* (2010) 181 Cal.App.4th 504, 507.) It follows that an aider and abettor may rely on the doctrine of imperfect self-defense or defense of another to mitigate the mens rea by negating the malice element of murder. (See *People v. Randle*, *supra*, 35 Cal.4th at pp. 994–995.)

The doctrine of imperfect defense of another requires that the defendant must have had "an actual but unreasonable belief he must defend another from imminent danger of death or great bodily injury." (*People v. Randle*, *supra*, 35 Cal.4th at p. 997.) For an instruction based on this doctrine, there must be substantial evidence from which the jury could find the defendant actually had the requisite belief. (Cf. *People v. Oropeza* (2007) 151 Cal.App.4th 73, 82 [imperfect self-defense].) When a defendant does not testify or make out-of-court statements, substantial evidence of his or her state of mind may be found in the testimony of other witnesses. (*Ibid.*)

Here, no witness testified appellant rushed to help Roberson because he actually believed him to be in imminent danger of death or great bodily injury. There was no evidence that the confrontation between Roberson and Smith was escalating to a fight at the time Roberson made the phone call. Nor is there evidence Smith or anyone else was armed and threatening Roberson. To the contrary, Wilson testified that Smith did not want to fight. There is no evidence that when Roberson said he "got into it" with Smith, he meant that he and

Smith had gotten into a physical altercation or that he needed help because he was in danger. Spinks repeatedly used the phrase "got into it" to mean "argue."

The evidence indicates Roberson sought to escalate what was essentially a verbal confrontation to gun warfare. That is how Wilson understood Roberson's statement that when his "homies" got to the station, there would be no fist fighting. Smith's statement that Roberson was "trippin," and the fact that Smith, too, considered calling his "homies" also indicate Roberson was overreacting and attempting to escalate the conflict rather than asking for help because he was in immediate danger. Notably, there is no evidence that Smith actually called for reinforcements or that Roberson sought help because he feared an escalation of the conflict by Smith.

Since there is no direct evidence of appellant's state of mind and the circumstantial evidence indicates Roberson did not seek help because he was in immediate danger of death or great bodily injury, it would be speculative to conclude that appellant was under an actual belief that he needed to bring an assault weapon to the train station in order to defend Roberson from such danger. The trial court was not required to present a speculative theory the jury could not reasonably find to exist. (*People v. Oropeza*, *supra*, 151 Cal.App.4th at p. 78.) No instructional error occurred.

II. *Ineffective Assistance*

Appellant complains of ineffective assistance of counsel because trial counsel did not advise him of his right to testify and did not seek clarification whether appellant's prior conviction of possession of an assault weapon could be used for impeachment. The decision whether to testify "is made by the defendant after consultation with counsel. [Citations.]" (*People v. Carter* (2005) 36 Cal.4th 1114, 1198.) To establish a denial of the right to effective assistance of counsel, a defendant must show that his or her counsel's performance was deficient and that there was a reasonable probability of a more favorable result but for the deficiency. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 691–694; *People v. Frye* (1998) 18 Cal.4th 894, 979.)

Appellant raised the claim of ineffective assistance of counsel in his motion for a new trial. In a declaration supporting the motion, appellant stated he wanted to testify but his trial attorney advised him not to because he would be impeached with his prior conviction for possessing an assault weapon. According to appellant, counsel did not advise that the ultimate decision whether to testify was appellant's. During the hearing on the motion, counsel testified that, in his long career as a criminal defense attorney, his usual practice had been to advise his clients of their absolute right to testify; even though he did not specifically recall having done so in appellant's case, counsel saw no reason why he would have deviated from that practice. The trial court found counsel to be credible and the timing of appellant's claim to be

suspect as it was "hard to believe" appellant would not have raised the issue earlier if he really wanted to testify.

Defendant would have us redetermine issues of credibility, but we may not interfere with the trial court's reasonable factual determinations at the hearing on the motion for a new trial, as they are supported by substantial evidence. (*People v. Delgado* (1993) 5 Cal.4th 312, 329; *People v. Rabanales* (2008) 168 Cal.App.4th 494, 509.) It was reasonable for the trial court to infer that, in this case, trial counsel followed his usual practice of advising his clients of their right to testify. (See *People v. Lewis* (1999) 74 Cal.App.4th 662, 668 [usual practice testimony supports inference of act in conformity on particular occasion].) It also was reasonable for the trial court to discredit appellant's post-trial claim that his attorney prevented him from testifying. "When the record fails to disclose a timely and adequate demand to testify, 'a defendant may not await the outcome of the trial and then seek reversal based on his claim that despite expressing to counsel his desire to testify, he was deprived of that opportunity.' [Citations.]" (*People v. Alcala* (1992) 4 Cal.4th 742, 805–806.)

Contrary to appellant's representation on appeal, counsel recalled advising appellant before trial of his right to a hearing on whether his possession of assault weapon conviction could be used to impeach him. By the time the defense presented its case, there was clear authority that possession of an assault weapon was a crime of moral turpitude that could be used for impeachment. (*People v. Gabriel* (2012) 206 Cal.App.4th 450, 457–458.)

The trial court's conclusion that counsel's performance was not deficient is supported by substantial evidence, as is its conclusion that appellant's testimony would not have made a more favorable result reasonably probable. Appellant was able to present his alibi defense through his co-workers and employment records, and his testimony that he was at work at the time of the shooting would have been cumulative. Appellant's claim that he could have convinced the jury he loaned his phone out is suspect since it would have been impeached with his prior inconsistent statement to the investigating officer. We find no ineffective assistance of counsel under the circumstances.

III. *S.B. 1437*

Appellant contends that under S.B. 1437, he is entitled to resentencing on his convictions of first degree murder and attempted premeditated murder, and that this court, not the trial court, should decide the issue in the first instance. We disagree.

The Legislature enacted S.B. 1437 to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) S.B. 1437 amended the definition of malice in section 188 to provide, "Except as otherwise stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice

aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3).) It also added section 1170.95, which permits those "convicted of . . . murder under a natural and probable consequences theory" to "file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining counts" when certain conditions apply. (§ 1170.95, subd. (a).) These new statutory provisions became effective on January 1, 2019, while appellant's case remained pending before the Supreme Court.

As the Attorney General notes, section 1170.95 provides the exclusive procedure by which defendants may seek relief under S.B. 1437. That statute requires appellant to file a petition in the trial court in the first instance.

Section 1170.95 authorizes defendants "convicted of felony murder or murder under a natural and probable consequences theory [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced" based on the changes S.B. 1437 made to sections 188 and 189. (§ 1170.95, subd. (a).) It also requires the trial court to redesignate the petitioner's conviction "as the target offense or underlying felony for resentencing purposes," where the "petitioner is entitled to relief pursuant to this section, murder was charged generically, and the target offense was not charged." (§ 1170.95, subd. (e).)

As a general rule, an amendatory or newly enacted statute reducing punishment is presumed to apply in all affected cases that

have not yet reached final judgment as of the statute's effective date. (*In re Estrada* (1965) 63 Cal.2d 740, 744; *People v. Floyd* (2003) 31 Cal.4th 179.) However, "[b]ecause the *Estrada* rule reflects a presumption about legislative intent, rather than a constitutional command, the Legislature . . . may choose to modify, limit, or entirely forbid the retroactive application of ameliorative criminal law amendments if it so chooses." (*People v. Conley* (2016) 63 Cal.4th 646, 656 (*Conley*).) "Our cases do not 'dictate to legislative drafters the forms in which laws must be written' to express an intent to modify or limit the retroactive effect of an ameliorative change; rather, they require 'that the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it.' [Citations.]" (*Id*. at pp. 656-657.)

In *Conley*, our Supreme Court concluded that a statute enacted pursuant to the Three Strikes Reform Act of 2012 (Proposition 36), section 1170.126, constituted an explicit legislative directive overriding the *Estrada* rule. (See *Conley, supra*, 63 Cal.4th at pp. 657-661.) That statute authorizes "persons presently serving an indeterminate term of imprisonment" under the Three Strikes law to "file a petition for a recall of sentence . . . to request resentencing in accordance with" Proposition 36. (§ 1170.126, subds. (a) & (b).) The Supreme Court concluded that section 1170.126 "extend[ed] the retroactive benefits of the Act beyond the bounds contemplated by *Estrada*—including even prisoners serving *final* sentences within the Act's ameliorative reach—but subject to a special procedural mechanism for the recall of sentences

already imposed." (*Conley, supra*, 63 Cal.4th at pp. 657-658.) The court noted that section 1170.126 "did not distinguish between final and nonfinal sentences, as *Estrada* would presume, but instead drew the relevant line between prisoners 'presently serving' indeterminate life terms—whether final or not—and defendants yet to be sentenced." (*Id.* at p. 658.) The court concluded that section 1170.126 was "designed to strike a balance between the[] objectives of mitigating punishment and protecting public safety by creating a resentencing mechanism for persons serving indeterminate life terms under the former Three Strikes law, but making resentencing subject to the trial court's evaluation of whether, based on their criminal history, their record of incarceration, and other relevant considerations, their early release would pose an 'unreasonable risk of danger to public safety.' [Citation.]" (*Ibid.*)

The court also observed that the revised sentencing provisions of Proposition 36 "do more than merely reduce previously prescribed criminal penalties. They also establish a new set of disqualifying factors that preclude a third strike defendant from receiving a second strike sentence." (*Conley, supra*, 63 Cal.4th at p. 659.) Ultimately, the *Conley* court held that "[w]here, as here, the enacting body creates a special mechanism for application of the new lesser punishment to persons who have previously been sentenced, and where the body expressly makes retroactive application of the lesser punishment contingent on a court's evaluation of the defendant's dangerousness, we can no longer say with confidence, as we did in *Estrada*, that the

enacting body lacked any discernible reason to limit application of the law with respect to cases pending on direct review. On the contrary, to confer an automatic entitlement to resentencing under these circumstances would undermine the apparent intent of the electorate that approved section 1170.126." (*Id.* at pp. 658-659.)

The Supreme Court reached the same conclusion two years later in *People v. DeHoyos* (2018) 4 Cal.5th 594 (*DeHoyos*), in the context of the Safe Neighborhoods and Schools Act (Proposition 47). Like Proposition 36, Proposition 47 included "detailed provisions setting out the terms under which retrospective relief is available to persons who were serving, or who had already completed, felony sentences for offenses now redefined as misdemeanors." (*Id.* at p. 598.) Specifically, Proposition 47 added section 1170.18, subdivision (a), which permitted defendants whose felony crimes had been redefined as misdemeanors to "'petition for a recall of sentence before the trial court that entered the judgment of conviction in his or her case to request resentencing.'" (*Ibid.*) In *DeHoyos*, the Supreme Court considered how that section applied to a defendant who had been sentenced prior to the enactment of Proposition 47 but whose conviction was not yet final. (*Id.* at p. 600.) As in *Conley*, the court concluded that the sole avenue of relief for a defendant whose conviction was not yet final was the petition procedure set forth in section 1170.18, subdivision (a). (See *id.* at pp. 603-605.)

We agree with *People v. Martinez* (2019) 31 Cal.App.5th 719, 727 (*Martinez*) and *People v. Anthony* (2019) 32 Cal.App.5th 1102, 1153-1157 (*Anthony*) that "[t]he analytical framework animating the

decisions in *Conley* and *DeHoyos* is equally applicable here." (*Martinez, supra*, 31 Cal.App.5th at p. 727.) *Martinez*, whose analysis we, like *Anthony*, adopt, explained: "Like Propositions 36 and 47, Senate Bill 1437 is not silent on the question of retroactivity. Rather, it provides retroactivity rules in section 1170.95. The petitioning procedure specified in that section applies to persons who have been convicted of felony murder or murder under a natural and probable consequences theory. It creates a special mechanism that allows those persons to file a petition in the sentencing court seeking vacatur of their conviction and resentencing. In doing so, section 1170.95 does not distinguish between persons whose sentences are final and those whose sentences are not. That the Legislature specifically created this mechanism, which facially applies to both final and nonfinal convictions, is a significant indication Senate Bill 1437 should not be applied retroactively to nonfinal convictions on direct appeal. [¶] The remainder of the procedure outlined in section 1170.95 underscores the legislative intent to require those who seek retroactive relief to proceed by way of that statutorily specified procedure. The statute requires a petitioner to submit a declaration stating he or she is eligible for relief based on the criteria in section 1170.95, subdivision (a). (§ 1170.95, subd. (b)(1)(A).) Where the prosecution does not stipulate to vacating the conviction and resentencing the petitioner, it has the opportunity to present new and additional evidence to demonstrate the petitioner is not entitled to resentencing. (§ 1170.95, subd. (d)(3).) The petitioner, too, has the opportunity to present new or additional evidence on his or

her behalf. (§ 1170.95, subd. (d)(3).) Providing the parties with this opportunity to go beyond the original record in the petition process, a step unavailable on direct appeal, is strong evidence the Legislature intended for persons seeking the ameliorative benefits of Senate Bill 1437 to proceed via the petitioning procedure. The provision permitting submission of additional evidence also means Senate Bill 1437 does not categorically provide a lesser punishment must apply in all cases, and it also means defendants convicted under the old law are not necessarily entitled to new trials. This, too, indicates the Legislature intended convicted persons to proceed via section 1170.95's resentencing process rather than avail themselves of Senate Bill 1437's ameliorative benefits on direct appeal." (*Martinez, supra*, 31 Cal.App.5th at pp. 727-728.)

We conclude that appellant's murder and attempted murder convictions must be affirmed on appeal. We do so, however, without prejudice to his filing a section 1170.95 petition in the trial court.[4]

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[4] We respectfully disagree with *People v. Gentile* (2019) 35 Cal.App.5th 932, which distinguished *Martinez* and *Anthony* on the grounds that "none of those decisions were the result of a transfer from the California Supreme Court with directions to reconsider the cause in light of Senate Bill No. 1437." (See *id*. at p. 944.) We are not persuaded that a defendant whose case is nonfinal but transferred from the Supreme Court is differently situated for purposes of the *Estrada* analysis from a defendant whose case is nonfinal and simply on direct appeal. We likewise disagree that concerns of judicial economy warrant intervention in the narrow slice of cases transferred from the Supreme Court but not in others.

DISPOSITION

The judgment is affirmed without prejudice to appellant filing a section 1170.95 petition in the trial court.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

WILLHITE, J.

We concur:

MANELLA, P. J.

CURREY, J.